Years on Death for Illinois Man, Wash. Post, Feb. 6, 1999, at A3. The credibility of the criminal justice system takes a well-deserved hit when such cases are publicized.

As exonerations have mounted, the number of death sentences has decreased dramatically across America. In the 1990s, death sentences numbered over 300 per year. See, *e.g.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment, 1996* (1997) (320 sentences of death in 1996). In 2003, by contrast, 144 inmates received death sentences, the lowest in 25 years. U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment, 2003* 8, 14 (2004). As one observer noted, "'[j]uries are more reluctant to impose the death sentence for a variety of reasons, prime among them a parade of wrongfully convicted people leaving death row.'" Henry Weinstein, *Death Sentences on Decline as Public's Skepticism Grows*, L.A. Times, Dec. 14, 2004, at A 28 (quoting Robin M. Maher, director of ABA death penalty representation project).[5]

At the same time, the public has registered increasing concern over the administration of the death penalty. Of those surveyed in a recent poll, 62% were "very concerned" that innocent people may be put to death. An additional 26%

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[5] In Tennessee, other problems touching upon the legitimacy of death sentences have been reported. See, *e.g.*, John Shiffman, *Troubled Lawyers Still Allowed to Work Death Cases*, Tennessean, July 25, 2001, at 1A ("In the past quarter century, at least 39 Tennessee lawyers who have been disciplined by the state have represented defendants in capital cases * * * include[ing] lawyers who seriously neglected client's cases — missed key filing deadlines, failed to interview important witnesses, or lied to or stole from clients."); John Shiffman, *1 in 4 Blacks Condemned by All-White Juries*, Tennessean, July 27, 2001, at 1A ("All-white juries have sent 15 black men to Tennessee's death row since 1977 * * * [; t]hat accounts for one of every four blacks sentenced to death statewide — and one in two blacks outside Shelby County.").

were "somewhat concerned." Together, a combined total of 88% of respondents were concerned that innocent people may be put to death. Harris Interactive Poll, Feb. 12, 2003.

Support for the death penalty is diminished among respondents who believed that innocent people have been executed. James D. Unnever & Francis T. Cullen, *Executing the Innocent and Support for Capital Punishment: Implications for Public Policy*, 4 Criminology & Pub. Pol'y 3, 15 (2005) (finding a difference in support for the death penalty between the groups of nearly 20%). Even among supporters of capital punishment, grave concerns exist over its application. A study of public opinion in Texas, where a large majority supports capital punishment, found that a majority of respondents also supported a moratorium on executions. Scottt Vollum et al., *Confidence in the Death Penalty and Support for Its Use: Exploring the Value-Expressive Dimension of Death Penalty Attitudes*, 21 Just. Q. 521, 533 (2004) (registering 82 percent support for capital punishment and 64 percent support for a moratorium on executions). The surprising match of support for capital punishment with the desire for a moratorium on executions was most closely correlated with concern about the "protect[ion of] innocent people from being executed." *Id.* at 531, 536.

Concern over the number of exonerations has also found voice in this Court. See *Atkins* v. *Virginia*, 536 U.S. 304, 320 n.25 (2002) (noting the "disturbing" number of inmates on death row who have been exonerated); see also Assoc. Press, *O'Connor Questions Death Penalty*, N.Y. Times, July 4, 2001, at A9 (quoting Justice O'Connor's statement that "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed").

Amici urge this Court to vindicate our shared interest in ensuring that the public's confidence in the accuracy and fairness of our justice system is restored. That goal is frustrated if the courts are perceived to be placing undue hurdles

in front of defendants who discover strong evidence of innocence (particularly, but not limited to, DNA evidence) after conviction. If we are to ask citizens, as jurors, to deprive a person of liberty or to impose the ultimate sanction of death — or, through their elected representatives, to provide us with the necessary resources to investigate and prosecute crime — then our system of justice must, no less aggressively, seek to exonerate the wrongfully convicted.

II. Any Burden Imposed By Adjudication Of Claims Of Actual Innocence Is Far Outweighed By The Benefit Of Maintaining The Credibility Of Our System Of Justice

The cost to the credibility of our system of justice from the potential execution of the innocent far outweighs any disruption in proceedings that adjudication of actual innocence claims may bring. Although finality is important, *Calderon* v. *Thompson*, 523 U.S. 538, 555-556 (1998) (finality essential to retributive and deterrent functions of criminal law), its value is premised upon the assumption that those who are prosecuted and punished are in fact responsible for their crimes.

The number of credible actual innocence claims will always remain quite small. See *Schlup*, 513 U.S. at 325 n. 42 (observing that in a majority of federal habeas cases, claims would be rebutted by a strong presumption of guilt); see also Edward Lazarus, *The Limits of DNA Justice*, Wash. Post, June 16, 2000, at A-29 ("the universe of cases where DNA testing can provide such magic-bullet results is very small: basically, only rape or rape-murder cases, in which the exchange of genetic material necessarily occurs"). Even among all federal habeas claims, only a very small percentage are granted or remanded. See U.S. Dep't of Justice Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 17 (1995) (finding only

1% of petitions granted and another 1% remanded to state courts).

Indeed, a review of the adjudication of *Schlup* claims in the lower federal courts in the decade since this "gateway" became available provides additional indications that it is serving its intended purpose as a final safeguard against wrongful execution and imprisonment, without unduly burdening the courts with frivolous claims. *Amici* conducted a review of all judicial opinions available on Westlaw and Lexis (whether published or unpublished) since 1995 in which petitioners sought to avail themselves of the *Schlup* "gateway" by presenting what they claimed was new evidence of actual innocence. This research revealed that such decisions were issued by only 338 federal habeas courts (143 circuit courts, and 195 district courts). In 31 of those cases — 9.2% of the total — the courts found that the petitioners had presented sufficiently powerful claims of actual innocence to warrant consideration of their otherwise procedurally-barred constitutional claims. See Appendix B (listing all such cases). And in the vast majority of those cases, the underlying claims (whether of actual innocence, or of independent constitutional violations) were sufficiently meritorious as to result in immediate or eventual relief from the petitioner's conviction or sentence.

This "big picture" data certainly appears to suggest that the *Schlup* gateway, and the governing standard of relief, are functioning appropriately. *Schlup* has proven itself to be the extraordinary remedy and necessary safeguard that is applied only to petitioners in the small fraction of cases involving truly compelling evidence of actual innocence. Nor are the meritorious cases so entirely rare as to suggest that *Schlup* has not made and will not continue to make a meaningful contribution to our justice system. Indeed, to the 20 individual petitioners who have obtained such relief, it may well have made the difference between execution or a lifetime in prison and one at liberty. Surely, any "raising of

the bar" under *Schlup* that would deprive many such individuals of relief should be undertaken only on a compelling showing of need — a need that does not appear to exist given the lower courts' reasonable application of the current rule over the last decade.

Moreover, for the few credible claims of actual innocence that arise in federal habeas review, the values of efficiency and finality must be weighed against a basic principle of fairness that permits execution only if the defendant actually committed the crime of which he or she is accused. In that regard, "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969). And of course the State wins, too, when exonerations permit it to prosecute and punish the true perpetrators of crime.[6] That is the essence of justice.

CONCLUSION

For the reasons set forth above and in petitioner's brief, the judgment of the Sixth Circuit should be reversed.

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6 See Tom Ragan, *Years After Death Row Travesty, Killer Gets Due*, Chi. Trib., Sept. 8, 1999, at 1 (subsequent conviction of a different defendant for double murder that had wrongfully put Anthony Porter on Illinois' death row for fourteen years).

Respectfully submitted.

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SEPTEMBER 22, 2005

APPENDIX A

David P. Baugh	Assistant United States Attorney, E.D. Tex. 1978-1981, E.D. Va. 1981-1982
Daniel A. Bent	United States Attorney, D. Haw. 1982-1993; former Chief, Criminal Division and First Assistant United States Attorney, E.D. La.
James S. Brady	United States Attorney, W.D. Mich. 1971-1981
Robert C. Bundy	United States Attorney, D. Alaska 1994-2001
Kenneth Bynum	Assistant United States Attorney, D.D.C. 1984-1988
Paul B. Carroll	Consultant and trainer on police practices at National Institute of Justice, U.S. Dep't of Justice; 30 year veteran, Chicago Police Department
Barry Coburn	Assistant United States Attorney, D.D.C. 1985-1990

Gary Cordner, Ph.D.	Professor of Criminal Justice & Police Studies; Director, Regional Community Policing Institute; Director, International Justice & Safety Institute, Eastern Kentucky University; former Dean of the College of Justice & Safety, Eastern Kentucky University; Chief of Police, St. Michaels, Md. 1984-1987; former president, Academy of Criminal Justice Sciences; former-editor, American Journal of Police; former editor, Police Quarterly
Katherine B. Darmer	Associate Professor, Chapman University School of Law; Assistant United States Attorney, S.D.N.Y. 1995-1999
W. Thomas Dillard	United States Attorney, E.D. Tenn. 1981; N.D. Fla. 1983-1986
Steven Gilbert, Ph.D.	Director of Criminal Investigations Program, Assistant Professor, State University of New York, Canton
Hal D. Hardin	United States Attorney, M.D. Tenn. 1977-1981
Valerie Hunt, Ph.D	Visiting Professor, University of Arkansas, Dep't of Sociology and Criminal Justice
Eric J. Miller	Assistant Professor, St. Louis University Law School

Lawrence Kobilinsky, Ph.D	Professor, Associate Provost, John Jay College of Criminal Justice
Thomas R. O'Conner, Ph.D	Professor, North Carolina Wesleyan College
Katrina Pflaumer	United States Attorney, W.D. Wash. 1993-2001
John Raley	United States Attorney, E.D. Okla. 1990-1997
James H. Reynolds	United States Attorney, N. Iowa, 1976-1982
James G. Richmond	United States Attorney, N.D. Ind. 1985-1991
William W. Robertson	Captain, United States Army Judge Advocate General Corps 1968-1972; Assistant United States Attorney, D.N.J. 1972-1976; Chief of the U.S. Dep't Justice Organized Crime Strike Force, D.N.J. 1976-1978; First Assistant United States Attorney, D.N.J. 1978-1980; United States Attorney, D.N.J. 1980-1981

Richard A. Rossman	United States Attorney, E.D. Mich.1980-1981; Chief of Staff Criminal Division, U.S. Dep't of Justice 1998-1999; Chief Assistant United States Attorney, E.D. Mich. 1977-1979; Chief Deputy Federal Defender, Detroit, Mich. 1972-1975; Assistant Prosecuting Attorney, Oakland County, Mich. 1965-1967, 1970-71; Instructor, Detroit Police Department 1975-76
Eli B. Silverman, Ph.D	Professor, John Jay College of Criminal Justice
William D. Wilmoth	United States Attorney, N.D.W.V. 1993-1999

APPENDIX B

This Appendix lists all 338 cases available electronically on Westlaw or Lexis, whether published or unpublished, in which a federal habeas petitioner sought to use *Schlup* v. *Delo* to overcome a procedural default, by asserting a claim of actual innocence and presenting evidence that he or she characterized as "new." In determining which cases fit this criteria, we did not prejudge the merits of the proffered evidence or scrutinize whether it was in fact "newly discovered." If a court analyzed evidence that the petitioner characterized as new for *Schlup* purposes, the case is included on the list below, even if the Court held that the evidence at issue was available at the time of trial or could have been previously discovered with due diligence. On the other hand, if a petitioner did not identify any new evidence of any sort, but only made a bare claim of actual innocence (*i.e.*, based on the trial record), the case was excluded from this review. In some cases, *pro se* petitioners did not explicitly make a *Schlup* claim, but the courts nonetheless analyzed the petition under *Schlup*, and these cases are included below as well.

Because we sought to assess how courts have adjudicated *Schlup* claims under the current "no reasonable juror" standard, the following types of cases were necessarily excluded from our inquiry: 1) habeas claims in which a court stated in dicta that a petitioner had not asserted a claim under *Schlup* or presented any new evidence of innocence, after concluding that some or all of the petitioner's claims were procedurally barred; 2) direct federal appeals in which a defendant made a motion to a trial court to vacate a verdict or for a new trial; 3) "legal innocence" claims in which a petitioner claimed that he was actually innocent based solely on a change in the law; and 4) cases citing *Schlup* solely for unrelated propositions.

Evidence Held Sufficient to Pass Through *Schlup* "Gateway"

Courts of Appeals

Souter v. *Jones*, 395 F.3d 577 (6th Cir. 2005)

Cooper v. *Woodford*, 358 F.3d 1117 (9th Cir. 2004)

Jaramillo v. *Stewart*, 340 F.3d 877 (9th Cir. 2003)

Finley v. *Johnson*, 243 F.3d 215 (5th Cir. 2001)

Silva v. *Wood*, 2001 WL 737591, 14 Fed. Appx. 803 (9th Cir. Jun 29, 2001)

Martin v. *Baldwin*, 234 F.3d 1277 (9th Cir. 2000)

Wilkerson v. *Cain*, 233 F.3d 886 (5th Cir. 2000)

Gall v. *Parker*, 231 F.3d 265 (6th Cir. 2000)

Fairman v. *Anderson*, 188 F.3d 635 (5th Cir. 1999)

Lucas v. *Johnson*, 132 F.3d 169 (5th Cir. 1998)

Carriger v. *Stewart*, 132 F.3d 463 (9th Cir. 1997)

Demarest v. *Price*, 130 F.3d 922 (10th Cir. 1997)

Amrine v. *Bowersox*, 128 F.3d 1222 (8th Cir. 1997)

District Courts

Eastridge v. *United States*, 372 F. Supp. 2d 26 (D.D.C. 2005)

Garcia v. *Portuondo*, 334 F. Supp. 2d 446 (S.D.N.Y. 2004)

Bivens v. *Briley*, No. 00 C7327, 2004 WL 1718437 (N.D. Ill. July 29, 2004)

U.S. ex rel. McLaughlin v. *Bowen*, No. 02 C 8715, 2003 WL 23162441 (N.D. Ill. Sept. 15, 2003)

Nickerson v. *Roe*, 260 F. Supp. 2d 875 (N.D.Cal. 2003)

Brown v. *Crosby*, 249 F. Supp. 2d 1285 (S.D. Fla. 2003)

Brown v. *Singletary*, 229 F. Supp. 2d 1345 (S.D.Fla. 2002)

Paradis v. *Arave*, No.. CIV. 95-0446-S-EJL, 2000 WL 307458 (D. Idaho Mar 14, 2000)

Terry v. *Cross*, 112 F. Supp. 2d 543 (E.D. Va. 2000)

Watkins v. *Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000)

Bragg v. *Norris*, 128 F. Supp. 2d 587 (E.D. Ark. 2000)

Reasonover v. *Washington*, 60 F. Supp. 2d 937 (E.D. Mo. 1999)

Jose v. *Johnson*, No. 97-500, 1999 WL 1120374 (D. Or. Dec. 07, 1999)

Johnson v. *Norris*, 999 F. Supp. 1256 (E.D. Ark. 1998)

Abdur'Rahman v. *Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998)

Lambert v. *Blackwell*, 962 F. Supp. 1521 (E.D. Pa. 1997)

Richter v. *Bartee*, 973 F. Supp. 1118 (D. Neb. 1997)

McCoy v. *Norris*, 958 F. Supp. 420 (E.D. Ark. 1996)

Satcher v. *Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996)

Evidence Held Insufficient to Pass Through *Schlup* "Gateway"

Courts of Appeals

Fruichantie v. *Mazur-Hart*, 139 Fed. Appx. 809 (9th Cir. 2005)

Hundley v. *Roe*, 135 Fed. Appx. 55 (9th Cir. 2005)

Quintero v. *Stewart*, 121 Fed. Appx. 203 (9th Cir. 2005)

Bosley v. *Cain*, 409 F.3d 657 (5th Cir. 2005)

Matthews v. *Mazzuca*, 120 Fed. App. 856(2d Cir. 2005)

Knecht v. *Shannon*, 132 Fed. Appx. 407 (3rd Cir. 2005)

Hayes v. *Battaglia*, 403 F.3d 935 (7th Cir. 2005)

Osborne v. *Purkett*, 411 F.3d 911 (8th Cir. 2005)

Cox v. *Burger*, 398 F.3d 1025 (8th Cir. 2005)

Armstrong v. *Kemna*, 365 F.3d 622 (8th Cir. 2005)

Malone v. *Oklahoma*, 100 Fed. Appx. 795 (10th Cir. 2004)

United States v. *Cervini*, 379 F.3d 987 (10th Cir. 2004)

Watts v. *Norris*, 356 F.3d 937 (8th Cir. 2004)

Nance v. *Norris*, 392 F.3d 284 (8th Cir. 2004)

Sibley v. *Culliver*, 377 F.3d 1196 (11th Cir. 2004)

Doe v. *Menefee*, 391 F.3d 147 (2d Cir. 2004)

Hubbard v. *Pinchak*, 378 F.3d 333 (3rd Cir.2004)

Hargrave-Thomas v. *Yukins*, 374 F.3d 383 (6th Cir. 2004)

Bird v. *Hurst*, 110 Fed. Appx. 474 (6th Cir. 2004)

Townsend v. *Lafler*, 99 Fed. Appx. 606 (6th Cir. 2004)

Allen v. *Yukins*, 366 F.3d 396 (6th Cir. 2004)

Williams v. *Bagley*, 380 F.3d 932 (6th Cir. 2004)

Rouser v. *Pliler*, 105 Fed. Appx. 167 (9th Cir. 2004)

Liang v. *Guirbino*, 99 Fed. Appx. 769 (9th Cir. 2004)

Britton v. *Lehman*, 88 Fed. Appx. 202 (9th Cir. 2004)

Griffin v. *Johnson*, 350 F.3d 956 (9th Cir. 2003)

Gulertekin v. *Tinnelman-Cooper*, 340 F.3d 415 (6th Cir. 2003)

Gomez v. *Jaimet*, 350 F.3d 673 (7th Cir. 2003)

Hussman v. *Vaughn*, 67 Fed. Appx. 151 (3rd Cir. 2003)

Mattis v. *Vaughn*, 80 Fed. Appx. 154 (3rd Cir. 2003)

Sweger v. *Chesney*, 294 F.3d 506 (3rd Cir. 2003)

Blamblett v. *True*, 59 Fed. Appx. 1 (4th Cir. 2003)

Reid v. *True*, 349 F.3d 788 (4th Cir. 2003)

Brown v. *Kaiser*, 82 Fed. Appx. 609 (10th Cir. 2003)

Reynolds v. *Hines*, 55 Fed. Appx. 512 (10th Cir. 2003)

Meeker v. *Ward*, 45 Fed. Appx. 871 (10th Cir. 2002)

Hamm v. *Saffle*, 300 F.3d 1213 (10th Cir. 2002)

Gonzales v. *Jordan*, 37 Fed. Appx. 432 (10th Cir. 2002)

Fleenor v. *Scott*, 37 Fed. Appx. 415 (10th Cir. 2002)

Renfro v. *Scott*, 37 Fed. Appx. 413 (10th Cir. 2002)

Bondy v. *Scott*, 43 Fed. Appx. 168 (10th Cir. 2002)

Patterson v. *Bartlett*, 56 Fed. Appx. 762 (9th Cir. 2002)

McGriff v. *Hall*, 53 Fed. Appx. 405 (9th Cir. 2002)

Holiday v. *Mueller*, 51 Fed. Appx. 636 (9th Cir. 2002)

Charles v. *Baldwin*, 49 Fed. Appx. 715 (9th Cir.2002)

Smith v. *Newland*, 48 Fed. Appx. 233 (9th Cir. 2002)

Idleman v. *Newland*, 46 Fed. Appx. 522 (9th Cir.2002)

Gandarela v. *Johnson*, 286 F.3d 1080 (9th Cir. 2002) (en banc)

Banks v. *Cockrell*, 48 Fed. Appx. 104 (5th Cir. 2002)

Dunham v. *Travis*, 313 F.3d 724 (2d Cir. 2002)

Fortenberry v. *Haley*, 297 F.3d 1213 (11th Cir. 2002)

Sistrunk v. *Armenakis*, 292 F.3d 669 (9th Cir. 2002) (en banc)

Solano v. *Taylor*, 18 Fed. Appx. 660 (9th Cir. 2001)

Van Buskirk v. *Baldwin*, 265 F.3d 1080 (9th Cir 2001)

Bell v. *Pierson*, 267 F.3d 544 (7th Cir. 2001)

Amrine v. *Bowersox*, 238 F.3d 1023 (8th Cir. 2001)

Davis v. *Gammon*, 27 Fed. Appx. 715 (8th Cir. 2001)

Harvey v. *Myers*, 27 Fed. Appx. 850 (9th Cir. 2001)

Loving v. *Mahaffey*, 27 Fed. Appx. 925 (10th Cir. 2001)

Hawkins v. *Hargett*, 28 Fed. Appx. 837 (10th Cir. 2001)

Whitebird v. *Snider*, 28 Fed. Appx. 783 (10th Cir. 2001)

United States v. *Scott*, 21 Fed. Appx. 855 (10th Cir. 2001)

Roe v. *Scott*, 19 Fed. Appx. 781 (10th Cir. 2001)

Whitebird v. *Snider*, 28 Fed. Appx. 783 (10th Cir. 2001)

Smith v. *Suthers*, 18 Fed. Appx. 727, (10th Cir. 2001)

Burnett v. *Hargett, United States* v. *Stubbs*, Nos. 99-5230, 99-CV-731-E, 2000 WL 1174656 (10th Cir. Aug. 18, 2000)

Daffron v. *Norris*, No. 98-3269, 2000 WL 1093092 (8th Cir. Aug. 7, 2000)

Dowthitt v. *Johnson*, 230 F.3d 733 (5th Cir. 2000)

Lucidore v. *N.Y. State Division of Parole*, 209 F.3d 107 (2d Cir. 2000)

Paffhousen v. *Grayson*, No. 00-1117, 2000 WL 1888659 (6th Cir. Dec. 19, 2000)

Duffy v. *Collins*, No. 99-4251, 2000 WL 1477226 (6th Cir. Sept. 25, 2000)

Downs v. *Hoyt*, 232 F.3d 1031 (9th Cir. 2000)

Dew v. *Clarke*, 242 F.3d 381 (9th Cir. 2000)

United States v. *Zuno-Arce*, 209 F.3d 1095 (9th Cir. 2000)

High v. *Head*, 209 F.3d 1257 (11th Cir. 2000)

Wright v. *Hopper*, 169 F.3d 695 (11th Cir. 1999)

Beach v. *McCormick*, 191 F.3d 459 (9th Cir. 1999)

Madrid v. *Gregoire*, 187 F.3d 648 (9th Cir.1999)

In re Minarik, 166 F.3d 591 (3rd Cir. 1999)

Thomas v. *Taylor*, 170 F.3d 466 (4th Cir. 1999)

Royal v. *Taylor*, 188 F.3d 239 (4th Cir. 1999)

Graham v. *Angelone*, 191 F.3d 447 (4th Cir. 1999)

Hamilton v. *Taylor*, 168 F.3d 481 (4th Cir. 1999)

Graves v. *Cockrell*, 351 F.3d 143 (5th Cir. 1999)

Britz v. *Cowan*, 192 F.3d 1101 (7th Cir. 1999)

Johnson v. *Norris*, 170 F.3d 816 (8th Cir. 1999)

Ridgeway v. *Kaiser*, No. 99-7018, 1999 WL 547974 (10th Cir. July 28, 1999)

Phillips v. *Ferguson*, 182 F.3d 769 (10th Cir. 1999)

Lopez v. *Udall*, No. 98-2234, 1999 WL 397399 (10th Cir. June 17, 1999)

De Yonghe v. *Scott*, No. 97-5062, 1998 WL 166075 (10th Cir. Apr. 10, 1998)

Howard v. *Williams*, No. 97-2284, 1998 WL 67293 (10th Cir. Feb. 18, 1998)

Sellers v. *Ward*, 135 F.3d 1333 (10th Cir. 1998)

Vivian v. *Poole*, 161 F.3d 16 (9th Cir. 1998)

Tannenbaum v. *United States*, 148 F.3d 1262 (11th Cir. 1998)

Wilson v. *Greene*, 155 F.3d 396 (4th Cir. 1998)

Stewart v. *Angelone*, 149 F.3d 1170 (4th Cir. 1998)

Crist v. *Dolan*, 151 F.3d 1032 (7th Cir. 1998)

Satcher v. *Pruett*, 126 F.3d 561 (4th Cir. 1997)

English v. *Page*, 132 F.3d 36 (7th Cir. 1997)

Wood v. *Hall*, 130 F.3d 373 (9th Cir. 1997)

Thompson v. *Calderon*, 120 F.3d 1045 (9th Cir. 1997)

Jones v. *Olivarez*, 107 F.3d 16 (9th Cir. 1997)

Wooten v. *Hartwig*, 108 F.3d 1380 (7th Cir. 1997)

McCoy v. *Norris*, 125 F.3d 1186 (8th Cir. 1997)

Weeks v. *Bowersox*, 119 F.3d 1342 (8th Cir. 1997)

Perry v. *Norris*, 107 F.3d 665 (8th Cir. 1997)

Beeman v. *Iowa*, 108 F.3d 181 (8th Cir. 1997)

Anderson v. *Hopkins*, 113 F.3d 825 (8th Cir. 1997)

Moore v. *Bowersox*, 106 F.3d 405 (8th Cir. 1997)

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Hatch v. *Reynolds*, No. 95-6072, 1996 WL 60477 (10th Cir. Feb. 12, 1996)

Day v. *Evans*, No. 95-6336, 1996 U.S. App. LEXIS 1533 (10th Cir. Feb. 5, 1996)

Felker v. *Turpin*, 83 F.3d 1303 (11th Cir. 1996)

Zeitvogel v. *Bowersox*, 103 F.3d 54 (8th Cir. 1996)

Pitts v. *Norris*, 85 F.3d 348 (8th Cir. 1996)

Whitlock v. *Godinez*, 51 F.3d 59 (7th Cir. 1995)

LaRette v. *Bowersox*, 70 F.3d 986 (8th Cir. 1995)

Bannister v. *Delo*, 100 F.3d 610 (8th Cir. 1995)

Wyldes v. *Hundley*, 69 F.3d 247 (8th Cir. 1995)

Battle v. *Delo*, 64 F.3d 347 (8th Cir. 1995)

Sherron v. *Norris*, 69 F.3d 285 (8th Cir. 1995)

Washington v. *Delo*, 51 F.3d 756 (8th Cir. 1995)

Jones v. *Delo*, 56 F.3d 878 (8th Cir. 1995)

Nave v. *Delo*, 62 F.3d 1024 (8th Cir. 1995)

Allen v. *Nix*, 55 F.3d 414 (8th Cir. 1995)

Stafford v. *Ward*, 59 F.3d 1025 (10th Cir. 1995)

Gilbreath v. *Reynolds*, No. 94-7101, 1995 WL 139395 (10th Cir. Mar. 31, 1995)

Glass v. *Vaughn*, 65 F.3d 13 (3rd Cir. 1995)

District Courts

Townes v. *Brooks*, No. 04-5002, 2005 WL 1377888 (E.D. Pa. June 8, 2005)

Boyd v. *Booker*, No. 03-CV-10223, 2005 WL 1838622 (E.D. Mich. July 29, 2005)

Lyons v. *Jamrog*, No. 2103-CV-328, 2005 WL 1308233 (W.D. Mich. June 1, 2005)

Herbert v. *Jones*, 351 F. Supp. 2d 674 (E.D. Mich. 2005)

Sims v. *Patrick*, No. 04-3379, 2005 WL 914744 (E.D. Pa. Apr. 19, 2005)

Rinaldi v. *Gillis*, No. 03-1641, 2005 WL 701710 (E.D. Pa. Mar. 28, 2005)

Sanchez v. *Tennis*, No. 2:04-CV-4005, 2005 WL 645926 (E.D. Pa. Mar. 17, 2005)

Scott v. *Lavan*, No. 03-06778, 2005 WL 387635 (E.D. Pa. Feb. 16, 2005)

Saunders v. *Vaughn*, No. 03-3115, 2004 WL 2536829 (E.D. Pa. Nov. 9, 2004)

Housley v. *Tennis*, No. 04-658, 2004 WL 1737646 (E.D. Pa. July 30, 2004)

Clements v. *Com. of Va.*, No. 705CV00153, 2005 WL 1801717 (W.D. Va. July 27, 2005)

London v. *Johnson*, No. 2:04CV746, 2005 WL 1279146 (E.D. Va. May 27, 2005)

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No. 04-8990

IN THE
Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent,

On Writ Of Certiorari To
The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR THE INNOCENCE PROJECT, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The Innocence Project, Inc. ("the Project"), is a nonprofit legal clinic and criminal justice resource center. Founded at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence. The Project pioneered the post-conviction DNA litigation model that has to date exonerated over 160 innocent persons, and served as counsel or provided critical assistance in the majority of these cases. Currently, the Project represents over 140 individuals seeking post-conviction DNA testing, or relief from their convictions based on DNA test results, in dozens of states. The Project has also served as counsel in the leading cases heard in the federal courts to date concerning the federal constitutional right of access to exculpatory DNA evidence. These include, *inter alia*, *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002), and *Godschalk v. Montgomery County Dist. Atty.'s Ofc.*, 177 F.Supp.2d 366 (E.D. Pa. 2001).

As perhaps the nation's leading authority on DNA evidence and wrongful convictions, the Project and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science, charged with regulating all state and local crime laboratories) are regularly consulted by officials at the state, local, and federal level. This work has given *amicus* a particularly strong interest in ensuring that jury verdicts are premised upon valid and accurate forensic science – an interest that is directly implicated by this Petitioner's constitutional claims in a number of respects.

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[*] *Amicus* certifies that this brief was written by undersigned counsel, and that no counsel for a party authored any portion of this brief or made any monetary contribution to its preparation or submission. Petitioner and Respondent have both consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

A decade ago, when this Court last considered the constitutional safeguards available to *habeas* petitioners with persuasive claims of actual innocence, it noted that such claims were "extremely rare." *Schlup v. Delo*, 513 U.S. 298, 321 (1995). Without question, the criminal justice landscape has changed dramatically in the intervening decade. DNA technology – aptly described by former Attorney General John Ashcroft as "nothing less than the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent"[1] – has since freed dozens of citizens from our nation's prisons and death rows, scientifically proving their innocence beyond any doubt. And while it remains true in the years since *Schlup* (thanks largely to state officials' acceptance of the probative value of DNA evidence) that federal habeas proceedings are not the primary forum in which such exonerations occur, these cases have nonetheless provided irrefutable proof that wrongful convictions are far less "rare" than anyone – including advocates for the innocent – ever imagined.

Yet the DNA "revolution" has done more than reveal that our nation has, with troubling frequency, sent innocent citizens to prison and death row. It has also exposed grievous flaws and shortcomings of various "old" methods of forensic science, ones that directly caused many of these wrongful convictions.[2] This fact – and the lower courts'

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[1] Naftali Bendavid, *U.S.targets DNA backlog; Agency to spend $30 million to aid state crime labs*, CHICAGO TRIBUNE, Aug. 2, 2001, at N10.

[2] *See* Michael J. Saks and Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 5 SCIENCE 892, 893-95 (2005) (describing how post-conviction DNA exonerations have exposed widespread error in other, more rudimentary forensic sciences, and surveying "worrisome data" on high error rates in those other disciplines). For example, 21 of the first 130 post-conviction DNA exonerations (16.15%) involved convictions obtained in reliance on